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Supreme Court of the United States

OCTOBER TERM 1974

74-720

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DIGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York, N. Y. 10007.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

The above-named petitioners, Gaspare DiGiorgio, LPI Transport Corp. and Pepsi-Cola, Inc. respectfully petition for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Second Circuit entered on the 9th day of October, 1974 which affirmed the judgment of the United States District Court for the Eastern District of New York which dismissed the third-party action of the petitioners in this action against the third-party defendant, United States of America.

Opinion Below

The Court of Appeals rendered no opinion on its determination. The opinion and decision of the District Court printed *infra*, as Appendix B.

Jurisdiction

The judgment and order of the Circuit Court of Appeals was entered on the 9th day of October, 1974 (Appendix A). No petition for rehearing has been made to the Circuit Court of Appeals for the Second Circuit, nor have any extentions of time been granted within which to file this petition. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), the Fifth and Seventh Amendments of the United States Constitution.

Questions Presented

1. Whether the construction of 5 U.S.C. 8116 (c) so as to prevent a defendant sued by an employee of the United States for injuries sustained in a local New York State automobile accident from bringing a third-party action for indemnity and/or other substantive relief afforded under *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 143 (1972) against the United States for the negligence of another of its employees in causing said accident is contrary to the dictates and spirit of 28 U.S.C. 2674 and 28 U.S.C. 1346 (b)?

2. Whether the construction of 5 U.S.C. 8116 (c) so as to prevent a defendant sued by an employee of the United States for injuries sustained in a local New York State automobile accident from bringing a third-party action for indemnity and/or the substantive relief afforded under *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 143 (1972) against the United States for the negligence of another of its em-

ployees in causing said accident deprives a defendant-third-party plaintiff of its rights to due process under the Fifth Amendment of the United States Constitution and its Seventh Amendment right under the United States Constitution by preventing it of its entitlements under Rule 14 (a) F.R.C.P.

3. Whether the judgment, order and determination of the Second Circuit Court of Appeals in this instance represents an obvious conflict of authority of this Circuit with that of the Appellate Courts of other Federal Jurisdictions on the same subject and the decisions of this Court.

4. Whether the judgment, order and determination of the Second Circuit Court of Appeals has decided this issue in conflict with the law of the State of New York.

Statutes

28 U.S.C. 2679 (b)

> The remedy by suit against the United States as provided by Section 1346 (b) of this title for damages to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

5 U.S.C. 8116 (c) provides:

> "The liability of the United States or any instrumentality thereof under this sub-chapter or any extension thereof under this sub-chapter or any extension thereof with respect to the injury or death of

an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin or any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death *in a direct judicial proceeding,* in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However this subdivision does not apply to a master or a member of a crew of a vessel." (emphasis added)

Section 11 of the Workmen's Compensation Law of the State of New York states:

"The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representative, husband, parents, dependents or next of kin, or anyone otherwise on account of such injury or death * * *."

Section 1401 Civil Practice Law and Rules of the State of New York:

"Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro-rata share shall be entitled to contribution from other defendants with respect to the excess paid over and above his pro rata share: provided however, that no defendant shall be compelled to pay to any other such defendant an amount greater than this own pro rata share of the entire judgment. Recovery may be had in a separate action or a judgment in the origi-

nal action against a defendant who has appeared may be entered on motion made on notice in the original action."

28 U.S.C. 2674 states that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances and, under 28 U.S.C. 1346 (b), the United States District Courts have exclusive jurisdiction of actions where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the acts or omissions occurred.

Section 1401. Civil Practice Law and Rules. Claim for Contribution.

Except as provided in section 15-108 of the general obligations law, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

Section 1402. Amount of Contribution.

The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.

Section 1403. How contribution claimed.

A cause of action for contribution may be asserted in a separate action or by cross-claim, counter-claim or third-party claim in a pending action.

Section 1404. Rights of perso.. entitled to damages not affected; Rights of indemnity or subrogation preserved.

(a) Nothing contained in this article shall impair the rights of any person entitled to damages under existing law.

(b) Nothing contained in this article shall impair any right of indemnity or subrogation under existing law.

(These laws took effect on September 1, 1974.)

Statement of the Case

This action and appeal arose out of a collision on a public highway in the City of New York between a United States Government owned vehicle which was driven by its employee Robert Cooper with co-employee Robert Sheridan as a passenger (at the time both occupants of the Government vehicle were in the course of employment) and a vehicle owned by LPI Transport Corp. and driven by Gaspare DiGiorgio in the business of Pepsi-Cola Inc. Robert Sheridan brought action for damages for injuries he sustained in the accident against DiGiorgio, LPI and Pepsi-Cola sounding in negligence in the New York State Supreme Court, Kings County (3a-5a). The named defendants brought a third-party action against the driver of the Government car, Robert Cooper and against Robert Sheridan as the one in control of the vehicle, for indemnity alleging that their negligence caused the accident (14a-19a).

By October 10, 1973 the entire case had been removed to the United States District Court for the Eastern District of New York and the United States had been substituted as third-party defendant Robert Cooper pursuant to 28 U.S.C. 2679 (b) (52a-54a).

The United States moved on January 18, 1974 for an order dismissing the third-party action against Robert Sheridan and permitting the United States to serve and file an amended third-party answer. That motion was granted (65a-1-65a-2), (55a, 56a).

The amended third-party answer of the United States set forth the affirmative defense that the third-party complaint failed to state a cause of action upon which relief could be granted on the grounds that the exclusive remedy against the United States was under the Federal Employers Compensation Act, 5 U.S.C. 8116 (c) (66a-67a).

The United States then cross-moved on February 5, 1974 pursuant to Rule 12 (d) of the Federal Rules of Civil Procedure for the Court to hear and determine its third-party defense (72a-73a) after the third-party plaintiffs had moved on February 1, 1974 for an order dismissing the workmen's compensation defense in the third-party answer (68a-69a).

In a decision and order dated March 26, 1974 the Court dismissed the third-party action (74a-83a) and on April 24, 1974 issued a Rule 54(b) certificate directing that a final judgment be entered (87a). The Clerk issued the final judgment on April 26, 1974 (88a) (Appendix C).

In its Decision and Order, the District Court succinctly defined the issue before it:

> "Stated in a different manner, the question now posed is whether or not the exclusivity section of FECA can be legitimatelly extended to revoke the consent of the United States to be sued for contribution or indemnity under the Federal Tort Claims Act." (76a)

The Court conceded:

> "A review of the applicable federal case law reveals an obvious conflict of authority among the various circuits on the question." (77a)

However, the Court adopted the "majority approach" (77a-78a) and reasoned that the exclusive remedy provision of FECA prohibited third-party suits by one tort-

feasor against the United States, as an alleged joint tortfeasor, for contribution when the injured party is a federal employee (78a) because the United States would thereby be forced to pay an amount in excess of its statutory obligation to the employee and, in effect, would cast the United States in the role of primary defendant in its employee's action (79a). The Court also decided that, although there was a decision in another circuit (*Murray* v. *United States,* 405 F2nd 1361 [D.C. Cir. 1968]), which agreed with the proposition within the context of contribution actions, but questioned the use of the same rationale in indemnity suits (80a), since the traditional underlying contractual agreement between the United States and the third-party plaintiff was missing here and admiralty concepts were not applicable, there was no basis for indemnity (81a-82a).

An appeal was taken by the third-party plaintiffs from the District Court judgment to the United States Court of Appeals for he Second Circuit (89a-90a).

By order and judgment of the Circuit Court entered October 9, 1974, the judgment of the District Court was unanimously affirmed without opinion (Appendix "A").

Reasons for Granting the Writ

1. According to *Dole* v. *Dow Chemical Co.,* 30 N.Y. 2d 143 (1972) and *Rogers* v. *Dorchester Associates,* 32 NY2nd 553 (1973), the Court of Appeals of the State of New York did away with the traditional concepts of total indemnity as between and among joint tortfeasors except where the one claiming indemnity is only vicariously liable to the plaintiff for the sole fault of another, and substituted in its place an apportionment of the total damages recovered by a plaintiff against any or all of the defendants between such defendants and the codefendants and/or third-party defendants in proportion to their respective faults in

causing the damages recovered by the plaintiff. However, in this new formula for recovery over, the New York Court of Appeals in *Dole* v. *Dow* specifically held on pages 152 and 153 of its decision that the exclusive remedy provisions of the New York State Workmen's Compensation Act did not exempt plaintiff's employer from an action for indemnity or based upon this new form of contribution brought by a fellow joint tortfeasor for its share of the damages commensurate with the employer's fault. The judicial reasoning for this concept being that such employer owed and breached an independent duty to a defendant cast in liability for damages to the plaintiff by its, the employer's, fault in causing or contributing to the defendant's liability. Thus, under New York State law no underlying contract is required between the third-party plaintiff and the employer to entitle the third-party plaintiff to indemnity or contribution from the employer.

It is submitted that the wording of the New York State Workmen's Compensation Law, Section 11 is exactly the same as 5 U.S.C. 8116 (c) and the provisions of the former Longshoremen's and Harbor Workers Act, 33 U.S.C. 905 (b).

In *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597, 601, this Court interpreted the wording in 5 U.S.C. 757 (b) identical to 5 U.S.C. 8116 (c), as follows:

> "The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admiralty law affecting mutual rights and liabilities of private shipowners in collision cases."

28 U.S.C. 2674 states that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances and 28 U.S.C. 1346 (b) requires that the United States shall be liable to a claimant in accordance with the law of the place where the act or omission occurred. Under *Dole* v. *Dow* actions for indemnity and/or "contribution" can be brought in New York in litigation arising out of motor vehicle accidents (*Sanches* v. *Hertz Corporation*, 70 Misc 2nd 449; *Wattecamp* v. *Artkraft Strauss Sign Co.*, 75 Misc 2nd 934; *Moreno* v. *Galdorisi*, 30 AD 2nd 450).

Here if this accident had occurred under like circumstances except that a private individual was the employer of the injured plaintiff, he would be subject to a *Dole* v. *Dow*, third-party action for indemnity or the New York State brand of contribution. Yet, because the United States is the third-party defendant, although the FECA and the New York Workmen's Compensation exclusivity provisions read exactly alike, according to this determination the United States must be exempted from responsibility to the defendants who were cast in liability because of its total or partial fault. This does not afford the claimant citizen of the State of New York the equal and fair application of the statutory right of the Federal Tort Claims Act where only a strained and incompatible interpretation of term "contribution" as applied the wording of the FECA exclusivity provision deprives him of the same form of relief in a claim against the United States as he would obtain in a State action against an individual.

2. With one set of statutes (28 U.S.C. 2674 and 28 U.S.C. 1346 [b]), the Government gives the citizen redress against it for its wrongs to him and by a judicial interpretation deprives him of that right. If the United States is subject to liability for its fault to the same extent as the individual and if the actions brought against it must be tried according to local law, there is absolutely no justification, even

under the strict interpretation of the exclusivity provision of the FECA on the contribution concept, for arbitrarily holding that there must be an underlying contract between the defendant suing the employer United States for indemnity. The local law of New York requires no such contractual basis for indemnity.

The United States Court of Appeals, Third Circuit, in *Travelers Insurance Company* v. *United States*, 493 F. 2d 881, held that the FECA, while excluding actions for contribution or non-contractual tort indemnity against the Government employer of the plaintiff, does allow for such actions on the theory of implied contractual indemnity. That is just the basis upon which indemnity has always been and is now founded in New York (*Brown* v. *Rosenbaum*, 287 N.Y. 510, 518, 519; cert. den. 316 U.S. 689).

The pleadings in this case allege a cause of action for indemnity against the United States and the proof could show that the accident occurred because of the total fault of the driver of its vehicle for whom the Government is appearing as third-party defendant in this case. There was, therefore, no reason for dismissing this claim of the appellants for indemnity—no matter what judicial attitude is taken on the *Dole* v. *Dow* contribution claim.

3. If the Government employee driver here is found on trial to have caused the plaintiff's injuries by an overwhelming balance of its negligence compared to a miniscule amount of negligence on the part of the petitioners, according to the determination before this Court for review, the United States will not only have evaded the total monetary responsibility to the petitioners for its proportionate share of the fault, it will receive back from the petitioners that amount of the judgment they will be required to pay to the extent of the compensation payments. By this holding the United States will not just be saved from paying an amount of money to its employee in excess of that required under FECA, but in fact the Government will recoup all of its

FECA payments as the expenses of these petitioners even though the fault of its driver far exceeded that of the petitioner driver.

The obvious injustice arising from this line of judicial construction of the FECA has attempted to be mollified in the District of Columbia Circuit in *Murray* v. *United States,* 405 F. 2d 1361 (1968) and *Dawson* v. *Contractors Transportation Corp.,* 467 F. 2d 727 (1972) where the Court reduced the plaintiff's recovery to one-half the judgment as representing what would have been his employer's share had he been subject to suit.

If the *Murray* set-off is the solution to the inequities of the present interpretation of the FECA, this Court should now promulgate it as such and not subject another set of defendant litigants to the injustice of the existing diverse constructions.

4. The Court in *Wallenius Bremen G.m.b.H.* v. *United States,* 409 F. 2d 994 (1969), followed the precedent set down by this Court in *Weyerheauser Steamship Company* v. *United States* (*supra*) and *Treadwell Construction Company* v. *United States,* 372 U.S. 772 (1963), by adopting a reasoning and application reference to the term "contribution" which achieved rather than defeated its proper intent in justice.

A simple reading of *Dole* v. *Dow* and Sections 1401 through 1404 of the New York State Civil Practice Law and Rules shows that the contribution concept applied locally by that State's Court of Appeals is not the traditional "Contribution" relied upon by the Court of Appeals in the judgment to which this petition is addressed. It is a hybrid form of apportionment of liability among tortfeasors whether they be primary or secondary defendants. Actually, it changed the concepts of indemnity and the word "Contribution" was the closest term which approximates the intent. Under this formula propounded in *Dole* v. *Dow* the culpable employer of the plaintiff is not a

named or primary defendant, nor could he be under New York State law. That employer's responsibility to the primary defendant continues as it always has. The only thing that is changed is that pro-rata sharing by fault has been implemented instead of total recovery over.

This Court has a duty under 28 U.S.C. 2674 and 28 U.S.C. 1346 (b) to accommodate the application of its interpretation of the Federal Statutes to the substantive remedies afforded by local law. It is ridiculous if the litigant must be judged by a definition of a State "contribution" term differently in the Federal Courts than in the State Courts where it was created.

5. In *Travelers Insurance Company* v. *United States* (*supra*), p. 885, the Court said:

> "Federal courts are in hopeless conflict concerning the proper interpretation of the *Weyerheauser* and *Treadwell* decisions *supra.*"

Litigants throughout the United States are in a state of confusion about their rights and remedies in this field. Symptomatic resolution on a single case and fact pattern is not a solution to the petitioners in this action or future litigants. The Supreme Court of the United States has the obligation to accept this case for review and after review and evaluation set forth the standards which can be applied evenly, equally and justly in all jurisdictions.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of October one thousand nine hundred and seventy-four.

Present: HON. IRVING R. KAUFMAN,
Chief Judge.
HON. J. JOSEPH SMITH,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

74-1728

ROBERT SHERIDAN,

Plaintiff,

v.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, INC.,

Defendants and Third-Party Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Third-Party Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the third party plaintiffs-appellants.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX B

Decision and Order by Travia, D. J., Dated March 26, 1974.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

March 26, 1974

TRAVIA, D. J.:

The instant action arose out of an automobile accident occurring in Queens, New York on December 21, 1971. The plaintiff, Robert Sheridan, was a passenger in a government owned vehicle, being driven by Robert Cooper. Both Sheridan and Cooper were federal employees working for the Food and Drug Administration. The other vehicle involved in the collision was owned by LPI Transport Corporation and was being operated by Gasper DiGiorgio in the business of Pepsi-Cola, Incorporated.

Sheridan commenced a personal injury action against DiGiorgio, LPI Transport and Pepsi-Cola in the Supreme Court of the State of New York, Kings County. The defendants in turn brought a third-party action against both Sheridan and Cooper, seeking a *Dole v. Dow* apportionment of damages.[1] On December 29, 1972, the United States Attorney, pursuant to the provisions of Title 28 U.S.C. §2679, certified that the third-party defendant, Cooper, was acting within the scope of his employment as an employee of the United States at the time of the accident. Accordingly, the entire action was removed to this court and the United States of America

[1] See *Dole v. Dow Chemical Co.*, 30 N. Y. 2d 143, 331 N. Y. S. 2d 382, 282 N. E. 2d 288 (1972).

was substituted as a third-party defendant in the place of Cooper.[2]

On November 9, 1973 a similar certification was made by the United States Attorney with respect to Sheridan. Accordingly, on January 8, 1974, this court issued an order upon motion dismissing Sheridan as a third-party defendant. *See* Title 28 U.S.C. §2679(b). On that same date, this court granted the United States leave to amend its third-party answer, but denied the Government's motion for partial summary judgment.

Thereafter, the Government made application, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, to dismiss the third-party action based upon the third affirmative defense of its amended third-party answer, to wit:

> "The third-party claimant fails to state a complaint upon which relief can be granted as the exclusive liability of the United States of America is under the Federal Employees Compensation Act, 5 U.S.C. §8116(c)."

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[2]Title 28 U. S. C. §2679(d) provides in salient part:

> "Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto."

Authority has been delegated by the Attorney General to the several United States Attorneys, under 28 C.F.R. §15.3, to make the necessary certification.

Decision and Order by Travia, D. J., Dated March 26, 1974

The third-party plaintiffs then filed a cross-motion, under Rules 12(f) and 56 of the Federal Rules of Civil Procedure, requesting that this court grant partial summary judgment dismissing the Government's third affirmative defense.

The legal issue presented to this court for resolution is whether a cause of action for indemnity or contribution exists against the United States, as a third-party defendant, where the injured plaintiff is a government employee. It is well established that a federal employee is precluded from suing the United States for injuries sustained during the course of his employment and that his avenue of redress is strictly confined to the stated benefits set up under the Federal Employees Compensation Act (hereinafter referred to as "FECA"). *See Grenade v. United States*, 356 F. 2d 837 (2d Cir. 1966), *cert. denied*, 385 U. S. 1012 (1967). Stated in a different manner, the question now posed is whether or not the exclusivity section of FECA[3] can be legitimately extended to revoke the consent of the United States to be sued for contribution or indemnity under the Federal Tort Claims Act.

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[3]The exclusivity section of FECA is found in Title 5 U.S.C. §8116(c), which reads:

> "The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute."

Decision and Order by Travia, D. J., Dated March 26, 1974

The third-party plaintiffs maintain that the determination of this issue should be governed by the local law of the state where the injury occurred, namely, New York. In support of this contention, the third-party plaintiffs rely chiefly upon the United States Supreme Court's decision in *United States v. Yellow Cab Co.*, 340 U. S. 543 (1951). The *Yellow Cab* case, however, is not controlling in this particular context. That case involved an injured plaintiff who was not a federal employee. Consequently, the court never dealt with the impact of FECA upon actions brought under the Federal Tort Claims Act, which is the central issue now confronting this court. *See Busey v. Washington*, 225 F. Supp. 416, 421 (D.D.C. 1964). Moreover, the Government's immunity from suit under FECA is federally created and the dimensions of that exemption must be measured by federal rather than state standards. *See Newport Air Park, Inc. v. United States*, 419 F. 2d 342, 346-347 (1st Cir. 1969); 12 ALR Fed 616, 620 n. 7.

A review of the applicable federal case law, reveals an obvious conflict of authority among the various circuits on the question. *See* 12 ALR Fed. 616. The third-party plaintiffs urge this court to adopt the reasoning employed in *Wallenuis Bremen G.m.b.H. v. United States*, 409 F. 2d 994 (4th Cir. 1969), *cert. denied*, 398 U. S. 958 (1970) and *Travellers Ins. Co. v. United States*, 331 F. Supp. 189 (E.D. Pa. 1971).[4] These cases are, however,

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[4] *Wallenius Bremen* involved an indemnity action by a shipowner against the United States after the former had settled a claim brought by a Department of Agriculture inspector, who had fallen from a ladder while aboard the shipowner's vessel. The court in analyzing FECA's exclusivity provision, employed the *ejusdem generis* rule and construed the language "anyone otherwise entitled" to mean those individuals personally related to the federal employee. The court interpreted the phrase so as not to exclude strangers from suing the Government. This same reasoning was also employed in the *Travellers* case.

representative of what might be termed a "minority viewpoint" and this court believes that the "majority approach" is far more persuasive.

Illustrative of the majority stance is *Busey v. Washington, supra,* wherein a mail carrier was injured while riding in a mail truck which struck a protruding piece of angle iron on a salvage truck. The plaintiff, who had collected FECA benefits, subsequently brought an action against the owner and operator of the salvage truck. The defendants, seeking contribution, impleaded the United States and the postal truck driver. The court held that the exclusive remedy provision of FECA prohibited third-party suits by one joint tortfeasor against the United States, as an alleged joint tortfeasor, for contribution when the injured party was a federal employee. After exploring the legislative history of the exclusivity provision of FECA, the court found that:

> "[T]he purpose of Workmen's Compensation Statutes such as the one herein involved, is not only to provide for employees 'a remedy which is both expeditious and independent of proof of fault, *but also for employers a liability which is limited and determinate.*' To permit contribution against the United States would not be in keeping with this purpose, inasmuch as the liability of the employer, the United States in this case, would cease to be limited and determine." *Id.* at 423. (Italics in original).

A third-party action cannot be used as a vehicle to circumvent the statutory intent of limiting the Government's liability to the amount scheduled under FECA. If the rule were otherwise, the Government's immunity would be illusory, evaporating the instant that another wrongdoer could be found and brought in as a defend-

ant. Thus, the United States would be forced to pay an amount in excess of its statutory obligation to the injured employee, albeit indirectly through a third-party plaintiff.

Another convincing rationale compelling the dismissal of the third-party suit here springs from the very nature of an action for contribution. Contribution was designed to obviate the inequity of permitting an injured plaintiff to select by whim or caprice a single defendant, from among several common joint tortfeasors, to shoulder the entire burden of liability. This danger is no longer present, however, where one of two joint tortfeasors is immune from suit. As Judge Coffin pointed out in his concurring opinion in *Newport Air Park, Inc. v. United States, supra*, 419 F. 2d at 347 (1st Cir. 1969):

> "In the case where one of the tortfeasors is immune from suit by the injured party—our case—the rationale behind contribution no longer exists, for there is no possibility of the arbitrary, fortuitous, or collusive choice of defendants which underlies contribution. That the government should go 'scot free' may be somewhat unfair, but the unfairness stems not from the law of contribution but from the fact that the government is given immunity under section 8116(c) in exchange for strict liability for specified benefits for all injuries of its covered employees."

Therefore, the reason underlying the need for contribution is undercut in situations such as the one presented herein, where there is no liability on the part of the indemnitor to the injured party. In a sense, the Government can no longer be considered as a joint tortfeasor within the meaning of the Federal Tort Claims

Act.[5] *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379 (9th Cir.), *cert. denied, United Air Lines, Inc. v. United States*, 379 U. S. 951 (1964); *accord, Wien Alaska Airlines, Inc. v. United States*, 375 F. 2d 736 (9th Cir.), *cert. denied*, 389 U. S. 940 (1967); *see Madux v. Cox*, 382 F. 2d 119 (8th Cir. 1967); *Scarbrough v. Murrow Transfer Co.*, 277 F. Supp. 92 (E. D. Tenn. 1967); *but compare Murray v. United States*, 405 F. 2d 1361 (D. C. Cir. 1968), which agrees with the proposition within the context of contribution actions, but questions the use of the same rationale in indemnity suits.

In *Newport Air Park, Inc. v. United States, supra*, a suit arose out of an aircraft collision which was caused by the joint negligence of both Newport and the Government. The widow of a federal employee killed in the crash collected $8,600 in FECA benefits and subsequently recovered an additional $50,000 from Newport in settlement of her claim. Although the widow repaid the Government the FECA award,[6] the court still dismissed Newport's contribution claim against the United States. The court opined that:

> "Looking at the question as one of federal law, we hold that contribution cannot be had from the government when the government was under no tort liability to the injured party. Even when the person obliged to pay was only secondarily liable,

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[5] As the court articulated in *Newport Air Park, Inc., v. United States, supra*, 419 F. 2d at 346:

> "As a matter of legal principle the route to contribution must be via subrogation or assignment based upon payment. In such circumstances we would suppose that there would be nothing to be subrogated to if the other party claimed to be a joint tort-feasor, was never under liability to the injured party." (Footnotes omitted.)

[6] *See* Title 5 U.S.C. §8132.

> and hence entitled to full indemnity, it has been held that no right arises against the primary actor if, as the employer, he was statutorily immune from tort liability." *Id. at* 347.

The Supreme Court's decisions in *Weyerhaeuser S. S. Co. v. United States*, 372 U. S. 597 (1963) and *Treadwell Const. Co. v. United States*, 372 U. S. 772 (1963), *reversing Drake v. Treadwell Const. Co.*, 299 F. 2d 789 (3d Cir. 1962), are distinguishable from the present action in that both cases involved a legal relationship between the wrongdoers which existed independently of the accident causing the injury to the plaintiff. In *Weyerhaeuser* the Court's determination to permit contribution was predicated upon the long honored rule in admiralty actions of dividing damages in mutual fault collisions, which was held to be preeminent over the provisions in FECA. Similarly, in the *Treadwell* case there was an underlying contractual agreement existing between the United States and the contractor, who had manufactured the steel tank which exploded and caused the plaintiff's injuries.[7] *See Panico v. Whiting Milk Co.*, 335 F. Supp. 315, 317 (D. Mass. 1971). By contrast, the nexus existing between the third-party plaintiffs and the Government here arises solely from the circumstances of the accident itself. There are no other connections between the parties which might provide the necessary linkage to establish an independent duty or

[7]It is noteworthy that the court in *Busey v. Washington*, *supra*, 225 F. Supp. at 421, found that the reversal in the *Treadwell* case was not a Supreme Court mandate to extend the boundaries of *Weyerhaeuser* beyond the narrow confines of admiralty collision cases. The *Busey* court thought it significant that the Supreme Court did not reverse the Third Circuit Court of Appeals with orders to reinstate the district court's ruling permitting contribution, but rather remanded the case to the district court to reconsider the case in light of *Weyerhaeuser*.

relationship. *See Slattery v. Marra Bros.*, 186 F. 2d 134, 138-139 (2d Cir. 1951), *cited in Panico v. Whiting Milk Co., supra,* 335 F. Supp. at 317 and *Murray v. United States, supra,* 405 F. 2d at 1367.

A cryptic indication of the Second Circuit's inclination to adopt the "majority approach" can be discerned from *Schwartz v. Compagnie General Transatlantique,* 285 F. Supp. 473 (S.D.N.Y.), *aff'd* 405 F. 2d 270 (2d Cir. 1968). In that case, a United States immigrant inspector was injured while engaged in official business aboard the defendant's vessel. In a suit by the inspector against the shipowner, the latter sought to implead the United States for indemnity based upon an alleged breach of an implied warranty of workmanlike performance. The court dismissed the third-party action, finding that no contract existed between the litigants and that no warranty could be implied between them. Although the court did not discuss the exclusivity provision of FECA, the court did cite *United Air Lines v. Wiener, supra,* [8] and it concluded that the claim over must be dismissed because there was no underlying tort liability on the part of the Government to the injured inspector. *Id.* at 474.

Accordingly, it is

ORDERED that the third-party plaintiffs' application for partial summary judgment dismissing the third affirma-

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[8] The *United Air Lines* case involved a midair collision of a commercial and a military airplane. In a suit brought by the estates of seven nonmilitary federal employees who were killed in the crash, the court held that the Air Lines was barred from suing the United States for indemnity. The basis for the decision was grounded upon the removal of the Government's tort liability under FECA. The court reasoned that any claim for contribution or indemnity in a noncontractual situation was confined to situations wherein the indemnitor was liable in tort to the injured plaintiff.

tive defense of the third-party defendant's amended answer be and the same is hereby denied; and it is further

ORDERED that the third-party defendant's application for an order dismissing the third-party action be and the same is hereby granted.

s/ ANTHONY J. TRAVIA
U. S. D. J.

APPENDIX C

Judgment.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This action came on for a hearing before the Court, the Honorable Anthony J. Travia, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered that the third-party defendant's application for an order dismissing the third-party action be granted and the court having expressly determined that there is no just reason for delay and expressly directed that final judgment be entered, it is

ORDERED and ADJUDGED that the third-party defendant's application for an order dismissing the third-party action be and the same is hereby granted.

Dated: Brooklyn, New York
April 26, 1974

LEWIS ORGEL
Clerk